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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

DAVID D. DALY, M.D.,

Petitioner

v.

CHARLES C. SPRAGUE, M.D., FREDERICK J. BONTE, M.D., ROGER N. ROSENBERG, M.D., THE UNIVERSITY OF TEXAS BOARD OF REGENTS, Individually and in their respective capacities, HOWARD RICHARDS, DAN C. WILLIAMS, JON NEWTON, JAMES L. POWELL, THOMAS H. LAW, WALTER G. STERLING, JESS HAY, JANE W. BLUMBERG, STERLING H. FLY, JR., M.D.,

Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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I.

INTRODUCTION

The Respondents, Charles C. Sprague, M.D., et al., respectfully request that this Court deny the petition for Writ of Certiorari invoked pursuant to 28 U.S.C. §1254(1), seeking review of the Fifth Circuit's opinion in

this case. That opinion, styled *David D. Daly, M.D. v. Charles C. Sprague, M.D., et al.*, No. 81-1237, was decided on May 14, 1982. It is reported at 675 F.2d 716.

II.

HISTORY OF LITIGATION

The Petitioner/Plaintiff filed this action on August 31, 1979, in the United States District Court for the Northern District of Texas, Dallas Division, claiming that Respondents'/Defendants' actions violated Petitioner's rights under 42 U.S.C. §1983 and §1985. The District Court granted Defendants' Motion for Summary Judgment, and entered Judgment sustaining Defendants' Motion to Dismiss on April 30, 1981.

Plaintiff appealed to the Fifth Circuit. That court affirmed in part and reversed and remanded in part the Judgment of the District Court.

III.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner advances several reasons why he believes Writ of Certiorari should be granted in this cause. He does not, however, establish an actual conflict between the decision below and that rendered by this Court or any other federal or state tribunal. His reasons raise no substantive issues which have not been precluded by the prior decisions of this Court.

A. REVIEW OF FIFTH CIRCUIT HOLDING ON 42 U.S.C. §1983 CLAIMS.

Property and Liberty Interests

Petitioner seeks review of the Fifth Circuit Court of Appeals' holding that the suspension of a physician's clinical privileges is not a deprivation of a property or liberty interest under the Fourteenth Amendment. Petitioner wrongly relies on the holdings of this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sinderman*, 408 U.S. 593 (1972), to support his allegations of deprivations of property and liberty interests.

The facts of the case at bar distinguish it from the holdings of *Roth* and *Sinderman*. Both *Roth* and *Sinderman* involve faculty terminations and tenure questions. The case before the Court has nothing to do with Petitioner's continued employment as a tenured employee.

Petitioner was and is employed as a faculty member at the University of Texas Health Science Center at Dallas in the Department of Neurology. Respondents have never terminated his employment or reduced his salary or academic rank. The only action taken by Respondents relative to Petitioner was to remove his clinical privileges for a period of approximately three weeks in 1979 because of his unavailability on the campus and his failure to make arrangements for alternative medical coverage for his patients—both breaches of his clinical duties.[1] When Petitioner returned to the University, resumed his job duties and asked that his clinical privileges be restored, the privileges were quickly reinstated. Clearly the action taken by Respondents did not rise to the level of "loss of employment" or raise any real issue of property interest. *Board of Regents of State Colleges v. Roth, supra* at pg. 14; *Perry v. Sinderman, supra* at pg. 14.

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1. It should be noted that Petitioner was on voluntary leave from June 29 to July 11, 1981, which effectively made his suspension from clinical duties less than a week.

Petitioner has likewise failed to demonstrate certain critical elements for a liberty interest showing. Petitioner was not dismissed and Respondents did not communicate their suspension of his privileges to anyone but Petitioner. The evidence showed that Petitioner was the only person responsible for communicating to others knowledge of his clinical suspension. Even if Respondents' actions in some way "deframed" Petitioner, he is still employed in his same position. His claim of a "tarnished reputation" does not give rise to a loss of a protected interest. *See Paul v. Davis*, 424 U.S. 693 (1976); *Moore v. Otero*, 557 F.2d 435 (5th Cir. 1977).

Furthermore, Petitioner wrongly relies on *Christhilf v. Annapolis Emergency Hospital Association, Inc.*, 496 F.2d 174 (4th Cir. 1974), as support for his claim of denial of property and liberty interests. In *Christhilf* the plaintiff, a doctor, was permanently banned from practicing at a certain hospital. While the Fourth Circuit held that the plaintiff was entitled to a hearing before a hospital board, the circuit recognized that "due process does not always require a hearing before a doctor's privileges are *suspended.*"(Emphasis added) *Christhilf v. Annapolis Emergency Hospital Assocation, Inc., supra* at p. 180. In the case at bar, Petitioner's clinical privileges—his right to see new patients—were only temporarily removed. The privileges were restored as soon as Petitioner demonstrated to University administrators that he was ready and able to resume his clinical responsiblitities. His tenure was not affected; his employment continued throughout the suspension. Petitioner has again totally failed to establish that he had any protected interests in his clinical privileges. *See Hayman v. Galveston*, 273 U.S. 414 (1927).

First Amendment

Petitioner has stated that the Fifth Circuit upheld his claim that Respondents infringed upon his First Amendment rights. This is a misstatement. On remand the Fifth Circuit directed the parties to address the following issues: (1) the existence or nonexistence of a genuine issue of fact surrounding curtailment of communication between Petitioner and his patients, and (2) Respondents' entitlement to judgment as a matter of law based on the constitutional implications of any such interference. Respondents would submit initially that there was not any evidence in the record before the trial court that established that Petitioner was unable to communicate with his patients because of Respondents' removal of his clinical privileges. Assuming, *arguendo*, that Respondents' suspension in some way operated as an actual curtailment of Petitioner's association with his patients, Respondents submit that such alleged infringement did not rise to the level of a protected activity that would trigger the protections or sanctions of the First Amendment. It is important to note that Petitioner was restricted in his practice only as a faculty member at the University. Obviously the Respondents, all administrators charged with the responsibility of overseeing the proper functioning of the University, were completely justified in temporarily suspending a doctor who had previously, by his own choice and without proper notice to Respondents, abandoned his patients and faculty responsibilities during the weeks prior to his suspension.

In the case at bar, there is a total absence of what may be appropriately termed classic free speech. No political statements or expressions concerning public affairs are involved. See *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1965). Certainly there appears to be the requisite compelling state interest to support an infringement or restriction of Petitioner's association with his patients—the University is ultimately responsible for the

care and treatment (or lack thereof) that patients receive at its facilities and from its staff members. Surely the possible health hazards arising from Petitioner's impaired ability or unavailability to provide treatment as a doctor and the abatement of such a danger by suspending his privileges until it could be determined by his immediate supervisor that Petitioner was ready and able to perform properly as a faculty member, demonstrates in and of itself, a compelling state interest in attempting to circumvent possible problems. See *Board of Educ. v. Pico,* _____U.S._____, 102 S.Ct. 2799, 2814, 73 L.Ed.2d _____ (1982).

First Amendment rights must be considered in light of the environment and special characteristics of the governmental institution involved. See *Healy v. James,* 408 U.S. 1969 (1972). Petitioner's rights to communicate and associate with his patients as a faculty member cannot be determined by focusing only on his own interests. The interests of his patients at the University, the Respondents who were his supervisors and administrators of the University, the University itself and the functions it discharges must also be considered and appropriately weighed. *See Pickering v. Board of Education,* 391 U.S. 563 (1968).

Petitioner has further claimed that the Fifth Circuit was unduly restrictive in its examination of Petitioner's First and Fourteenth Amendment allegations. Petitioner bears the burden of showing that, first, he engaged in conduct which was constitutionally protected, and, second, that this conduct was a substantial or motivating factor in the Respondent's decision to suspend him. *Givhan v. Western Consolidated School,* 439 U.S. 411 (1979); *Mount Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977).

Petitioner has claimed that his criticism of the University's accounting procedures was a substantial or

motivating factor in the suspension decision. This claim, however, was not properly presented to the trial court and cannot now be considered by this Court. Furthermore, the evidence clearly shows that, regardless of Petitioner's alleged criticism, Respondents would have suspended Petitioner because of his unavailability for the performance of his duties. The record is sufficient in proof that Respondents' actions were not arbitrary or capricious but rather were reasoned and supported.

When Petitioner's rights are construed in light of the special characteristics of the University and its medical environment, his alleged rights do not rise to the level of First Amendment protected activity, especially when the circumstances surrounding the suspension of his privileges are considered. See *Board of Education v. Pico, supra; Healy v. James, supra.*

B. CIRCUIT TREATMENT OF 42 U.S.C. § 1985 CLAIMS

Petitioner contends that when Respondents, acting as administrators of the University, removed his clinical privileges, they were in violation of 42 U.S.C. §1985. He urges the Court to find that the Fifth Circuit's refusal to recognize his § 1985 claims is against the weight of legal precedent. His proffered arguments are, however, totally inapplicable to the case at bar. Petitioner had the burden of proving that a conspiracy existed; he failed, however, to meet that burden.

Despite ample discovery time—over one and a half years—Petitioner never produced evidence by affidavit or other documentation that gave rise to any conceivable action under 42 U.S.C. § 1985. Although depositions have been taken in this cause, no evidence of any violation or infraction of § 1985 has been adduced and subsequently offered in rebuttal of Respondents'

Motion for Summary Judgment.[2] Petitioner's recital of various circuit court decisions dealing with "animus" and "discriminatory intent" and his reference to this Court's holdings in *Griffin v. Breckinridge*, 403 U.S. 88 (1971); *Gomez v. Toledo*, 446 U.S. 635 (1980); and *Owen v. City of Independence, Mo.*, 44 U.S. 622 (1980), are totally meaningless since Petitioner has failed evidentially to meet his burden of proof for his § 1985 claims.

CONCLUSION

For the foregoing reasons, Respondents respectfully suggest that the Court decline review of the judgment and opinion of the Court of Appeals for the Fifth Circuit and that Petition for Writ of Certiorari to the United States Supreme Court should be denied.

Respectfully submitted,

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2. Among the depositions taken were the depositions of Respondents Sprague, Bronte and Rosenberg, the alleged conspirators.

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that three (3) true and correct copies of the foregoing Respondents' Brief in Opposition were mailed, first-class mail, postage prepaid, to Mr. Charles J. Winikates, Winikates & Curtis, 2535 Republic Bank Tower, Dallas, Texas 75201, on this the _____ day of February, 1983.

LAURA S. MARTIN
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